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Answers to Questions about Presidential Vote Counting and the National Popular Vote Bill

Hon. Ed Jutila
Connecticut House of Representatives
Legislative Office Building
Hartford, CT 06106

Dear Representative Jutila,

Sean Parnell (a lobbyist engaged by the Freedom Foundation of Olympia, Washington to oppose the National Popular Vote Compact) has suggested several hypothetical scenarios in which the presidential vote count might be "incomplete, inaccurate, or simply unavailable" prior to the meeting of the Electoral College in mid-December. Under Parnell's scenario, a rogue Secretary of State could unilaterally "frustrate" the operation of the National Popular Vote Compact by refusing to certify the statewide vote count for President from his or her state.

SHORT ANSWER:

Existing state laws, existing federal laws, and the provisions of the National Popular Vote Compact prevent Parnell's hypothetical scenario from being successfully executed.

- Federal law requires creation and delivery of a certificate containing the popular-vote count for President *prior* to the meeting of the Electoral College. Because the refusal of a rogue Secretary of State to certify his own state's popular-vote count would disenfranchise his own state, voters favoring the about-to-be-disadvantaged presidential candidate could readily obtain a court order (mandamus) compelling compliance with federal law.
- Independently of the above federal requirements, every state has a state law providing a statutory deadline for certification of the popular-vote count for President by a specific date (long before the meeting of the Electoral College in mid-December) at the local-level or state level or both. Voters favoring the about-to-be-disadvantaged candidate could readily obtain a court order (mandamus) compelling compliance with state law.
- Presidential elections in the United States do not depend on the gracious willingness of Secretaries of State to certify their own state's election returns. If Parnell's theory about the unlimited power of a rogue Secretary of State to disenfranchise his own state's voters had any validity, any one of eight Democratic Secretaries of State could have thrown the Presidency to Al Gore in 2000. In 2000, there were eight states that George W. Bush carried that had a Democratic Secretary of State and that had enough electoral votes (five or more) which, if not cast in the Electoral College,

would have elected Al Gore as President (*even after* Bush received Florida's 25 electoral votes). Under the U.S. Constitution, winning the White House requires a majority of presidential electors *appointed*. No Secretary of State has the power (because of both state and federal laws) to prevent the popular vote from his or her state from being counted.

- In addition to existing state and federal laws, the National Popular Vote Compact gives the compacting states tools to guarantee that their electoral votes will be cast, and be cast in favor of the presidential candidate who received the most popular votes in all 50 states (and D.C.). Publicly available official counts for President exist in at least two separate places in *every* state long before the meeting of the Electoral College in mid-December, namely (1) at the level of local government where the votes were actually counted (e.g., towns in Connecticut and counties in most other states) and (2) at the state-level office to which the local vote counts were transmitted. Either set of publicly available official counts could be used.

MORE DETAILED DISCUSSION AND ANSWER:

In testimony before the Rhode Island House Judiciary Committee, Sean Parnell claimed:

> "There's little reason to believe that non-compact states will … ensure all the votes are counted by the deadline. They may very well decide that it is in their interest to frustrate National Popular Vote, and not finalize their vote counts until well after their electors have met and voted….
>
> "States are not required to count all ballots by the so-called Safe Harbor date, six days before electors meet. Nor are they required to submit their Certificates of Ascertainment by that date. In fact the states are not required to send in their Certificates of Ascertainment until such time as is (I'm taking the word from U.S. Code Title 3, Section 6) "practicable" after the meeting of electors. And they are not due to the Archivist of the United States until 10 days after the electors meet….
>
> "In the 2012 election, the state of New York submitted its Certificate of Ascertainment on December 10th, but did not certify its election results until December 31st. In the certified results, President Obama gained more than 300,000 additional votes on top of the total given in the Certificate of Ascertainment. And Governor Romney gained more than 80,000 additional votes. Under our current system, because President Obama had very clearly won the state of New York, the 380,000 votes not included in the Certificate of Ascertainment, did not make a difference. But had NPV been in effect, and the election had been close, such as in 1960 and 2000, the vote counting delay would have been crucial…."[1]

Virtually every statement above by Sean Parnell is incorrect. To understand why Mr. Parnell is mistaken, we start by discussing how votes for President are counted.

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[1] Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

How Votes for President Are Counted

Contrary to Sean Parnell's claims, *every* state has a specific statutory deadline (long before the mid-December meeting of the Electoral College) for finalizing an official count at either the local or state level and, in almost every state, at *both* levels.

Individual voters cast their votes for President in "election districts" (also called "precincts") throughout the United States.

Shortly after the polls close on Election Night, an official precinct tally is created for each candidate for each office on the ballot (including President) and for the "yes" and "no" positions for each ballot measure. If the votes are counted at the precinct location (as they are, for example, in Connecticut), the election officials at the precinct level produce an official document certifying their precinct's tally.

Precinct tallies are then typically forwarded to some unit of local government (the town level in Connecticut and the county level in most states), and officials at that level of government typically produce an official document aggregating the results from their local area.

Although the procedures vary from state to state, representatives of the candidates, political parties, proponents and opponents of ballot measures, civic groups, and the media typically all have the ability to immediately obtain the vote count for each precinct. Indeed, the almost-instant availability of precinct-level vote tallies provides the basis for the vote tallies that are posted on government web sites and broadcast by the media on Election Night.

Existing state laws also require rapid transmission of official documentation of vote tallies to some designated central location (e.g., the secretary of state). Rapid transmission is required by law in order to prevent a potentially corrupt locality from withholding its vote tallies until it learns the results from other parts of the state.

Connecticut's rapid reporting requirements are typical. Connecticut law requires the delivery of election results from the towns to the Secretary of State either

(1) by electronic means by midnight on Election Day or

(2) on paper by 6 PM of the next day.

Specifically, §9-314 of Chapter 148 of Title 9 of the Connecticut General Statutes (entitled "Return of list of votes by moderator") provides:

> "(a) As used in this subsection, "moderator" means the moderator of each state election in each town not divided into voting districts and the head moderator in each town divided into voting districts.
>
> **The moderator shall make out a duplicate list of the votes given in the moderator's town for each of the following officers: Presidential electors,** Governor, Lieutenant Governor, Secretary of the State, Treasurer, Comptroller, Attorney General, United States senator, representative in Congress, state senator, judge of probate, state representative and registrars of voters when said officers are to be chosen.
>
> Said list shall include a statement of the total number of names on the official check list of such town and the total number checked as having voted.
>
> The moderator may transmit such list to the Secretary of the State by facsimile machine or other electronic means prescribed by the Secretary of the State, **not**

> **later than midnight on Election Day**. If the moderator transmits such list by such electronic means, the moderator shall also seal and deliver one of such lists to the Secretary of the State **not later than the third day after the election**. If the moderator does not transmit such list by such electronic means, the moderator shall seal and deliver one of such lists by hand either (1) to the Secretary of the State **not later than six o'clock p.m. of the day after the election**, or (2) to the state police **not later than four o'clock p.m. of the day after the election**, in which case the state police shall deliver it by hand to the Secretary of the State **not later than six o'clock p.m. of the day after the election**. Any such moderator who fails to so deliver such list to either the Secretary of the State or the state police by the time required shall pay a late filing fee of fifty dollars. The moderator shall also deliver one of such lists to the clerk of such town on or before the day after such election. The Secretary of the State shall enter the returns in tabular form in books kept by the Secretary for that purpose and present a printed report of the same, with the name of, and the total number of votes received by, each of the candidates for said offices, to the General Assembly at its next session." [Emphasis added]

Between 6 and 10 days after Election Day, local authorities make official determinations on the eligibility to vote of provisional ballots that were cast on Election Day, and the additional official documents are created at the local level to reflect the results of including eligible provisional ballots in the precinct totals. In addition, in the process of rechecking local vote tallies, local authorities sometimes notice and correct administrative errors that may have occurred on Election Night (e.g., transposing digits, accidentally double-counting a precinct).

Then, §9-322a of Chapter 148 of Title 9 of the Connecticut General Statutes requires town clerks to file "official returns" with the Secretary of State no later than 21 days after Election Day.

> **Not later than twenty-one days following each regular state election**, the town clerk of each town divided into voting districts shall file with the Secretary of the State a consolidated listing, in tabular format, as prescribed by the Secretary of the State, of the official returns of each such voting district for all offices voted on at such election, including the total number of votes cast for each candidate, the total number of names on the registry list, and the total number of names checked as having voted, in each such district. The town clerk of such town shall certify that he or she has examined the lists transmitted under this section to determine whether there are any discrepancies between the total number of votes cast for a candidate at such election in such town, including for any recanvass conducted pursuant to section 9-311 or 9-311a, and the sum of the votes cast for the same candidate in all voting districts in such town. In the case of any such discrepancy, the town clerk shall notify the head moderator and certify that such discrepancy has been rectified. Each listing filed under this section shall be retained by the Secretary of the State not less than ten years after the date of the election for which it was filed.

The key point is that, within a few weeks after Election Day (long before the meeting of the Electoral College in mid-December), "official returns" consisting of the precinct-level vote

tallies for President exist *in at least two separate* places in Connecticut (and, indeed, every other state), namely

- at the level of the precinct or unit of local government where the votes were actually counted, and
- at the state office to which the local vote counts were transmitted.

The task remaining at the state level is to add up the "official returns" for each candidate for each office that come in from each town.

Connecticut law is also typical in that it requires the creation of the official statewide vote count by a specific day long before the meeting of the Electoral College in mid-December. In Connecticut, that deadline is the last Wednesday in November. Specifically, §9-315 of Chapter 148 of Title 9 of the Connecticut General Statutes (entitled "Canvass for presidential electors, U.S. senator and members of Congress") provides:

> "**The votes returned as cast for** a senator in Congress, representatives in Congress and **presidential electors shall be publicly counted** by the treasurer, Secretary of the State and comptroller **on the last Wednesday of the month in which they were cas**t, and such votes shall be counted in conformity to any decision rendered by the judges of the supreme court as provided in section 9-323. In accordance with the count so made, they shall, on said day, declare what persons are elected senators in the Congress of the United States or representatives in Congress, and the Secretary of the State shall forthwith notify them by mail of their election; and **they shall declare the proper number of persons having the greatest number of votes to be presidential electors** and, in case of an equal vote for said electors, shall determine by lot from the persons having such equal number of votes the persons appointed, and **the Secretary of the State shall forthwith notify them by mail of their appointment**." [Emphasis added]

Note that the wording "having the greatest number of votes" in §9-315 is what establishes the winner-take-all rule in Connecticut (that is, the winners are the seven candidates for the position of presidential elector who were nominated by the political party of the presidential candidate "having the greatest number of [popular] votes" in Connecticut).

The declaration in Connecticut on the last Wednesday in November required by §9-315 is what section 5 of Title 3, chapter 1 of the United States Code (the so-called "safe harbor" statute) calls the "final determination" of the presidential count.

> "If any State shall have provided, by laws enacted prior to the day fixed for the appointment of the electors, for its **final determination** of any controversy or contest concerning the appointment of all or any of the electors of such State, by judicial or other methods or procedures, and **such determination shall have been made at least six days before the time fixed for the meeting of the electors**, such determination made pursuant to such law so existing on said day, and made at least six days prior to said time of meeting of the electors, **shall be conclusive**, and shall govern in the counting of the electoral votes as provided in the Constitution, and as hereinafter regulated, so far as the ascertainment of the electors appointed by such State is concerned." [Emphasis added]

Note also that the statewide certification of the presidential vote count under §9-315 and the Secretary of State's notification under §9-315 is the process that identifies the winning presidential electors and gives them the right to cast Connecticut's votes in the Electoral College on the Monday after the second Wednesday in December.

Thus, the schedule of events concerning presidential elections in Connecticut in 2012 was as follows:

- November 6, 2012 — Election Day
- November 7, 2012 — 12 AM midnight deadline for counts from each town to reach the Secretary of State if sent by facsimile machine or other electronic means (as per §9-314)
- November 7, 2012 — 6 PM deadline for counts from each town to reach the Secretary of State if the counts were not already been transmitted by facsimile machine or other electronic means (as per §9-314)
- November 27, 2012 — Deadline for "official returns" to be filed with Secretary of State (as per §9-322a)
- November 28, 2012 — Last Wednesday in November — Deadline for completion of the canvass in Connecticut (as per §9-315)
- December 11, 2012 — "Safe Harbor" date (as per section 5 of Title 3, chapter 1 of the United States Code)
- December 17, 2013 — Meeting of the Electoral College

Sean Parnell envisions a hypothetical scenario in which rogue state officials unilaterally

> "may very well decide that it is in their interest to frustrate National Popular Vote, and not finalize their vote counts until well after their electors have met and voted."

If the National Popular Vote Compact had been in effect in 2012, if Connecticut were a non-compacting state, and if Connecticut officials refused to produce the official statewide tally for President required by §9-315 by November 28, 2012, Connecticut supporters of the presidential candidate who would be disadvantaged by such refusal would have had three separate bases for seeking remedial action—*any one of which would have been sufficient to favorably resolve their problem*, namely

- existing state law,
- existing federal law, and
- provisions of the National Popular Vote Compact.

State Statutory Deadlines

Connecticut's existing specific statutory deadline (and similar statutory deadlines in other states) is not just friendly advice to the Secretary of State and other ministerial officials. It is a legal requirement enforceable in court in the same way that any other state law is enforceable—that is, a court can compel a state official to execute a provision of law by mandamus (a judicial writ ordering performance of a specific action) and a court can enjoin a state official from violating the law with an injunction (a judicial writ prohibiting a specific action).

The table below shows either (1) the specific statewide statutory deadline (for 43 of the 50 states) or (2) in the case of the seven states with no statewide deadline,[2] the *even earlier* specific statutory deadline for the creation of documents containing the official count for President from local areas. As can be seen, all of these deadlines are long before the meeting of the Electoral College in mid-December.[3]

State statutory deadlines for certification of presidential elections

State	Deadline
Alabama	Alabama §17-12-17: All returns of elections required by law to be sent to the Secretary of State must, **within 22 days after an election**, be opened, counted, and certified in the presence of the Governor, Secretary of State, and Attorney General, or two of them
Alaska	Alaska Statutes §15.15.370: Completion of ballot count; certificate: When the count of ballots is completed, **and in no event later than the day after the election**, the election board shall make a certificate in duplicate of the results. The certificate includes the number of votes cast for each candidate, for and against each proposition, yes or no on each question, and any additional information prescribed by the director. The election board shall, immediately upon completion of the certificate or as soon thereafter as the local mail service permits, send in one sealed package to the director one copy of the certificate and the register. In addition, all ballots properly cast shall be mailed to the director in a separate, sealed package. Both packages, in addition to an address on the outside, shall clearly indicate the precinct from which they come. Each board shall, immediately upon completion of the certification and as soon thereafter as the local mail service permits, send the duplicate certificate to the respective election supervisor. The director may authorize election boards in precincts in those areas of the state where distance and weather make mail communication unreliable to forward their election results by telephone, telegram, or radio.
Arizona	Arizona §16-642: The governing body holding an election shall meet and canvass the election **not less than six days nor more than twenty days following the election.** Arizona §16-648: On **the fourth Monday following a general** election, the secretary of state, in the presence of the governor and the attorney general, shall canvass all offices.
Arkansas	State-level: Within 20 days after the election Country-level: Arkansas 7-5-701: **No earlier than forty-eight (48) hours after the election and no later than the fifteenth calendar day after** the election, the county board of election commissioners, from the certificates and ballots received from the several precincts, shall proceed to ascertain, declare, and certify the result of the election to the Secretary

[2] Alaska, Delaware, Florida, New Hampshire, Ohio, Tennessee, Texas.

[3] The District of Columbia Code does not contain a specific statutory deadline; however, because the District of Columbia is already a member of the National Popular Vote compact, the fourth clause of Article III of the compact establishes the statutory deadline on the District of Columbia (namely the federal "safe harbor" date).

	of State.
California	On the first Monday in the month following the election
Colorado	No later than the fifteenth day after any election
Connecticut	Last Wednesday in the month in which votes were cast
Delaware	Delaware Statutes Title 15, Chapter 57, §5701: Superior Court as board of canvass; convening and composition of Court: (a) The Superior Court shall convene in each county **on the 2nd day after the general election at 10 a.m.**, for the performance of the duties imposed upon it by §6 of article V of the Constitution of this State and by this chapter. Thereupon the Court, with the aid of such of its officers and such sworn assistants as it shall appoint, shall publicly ascertain the state of the election throughout the county and in the respective election districts by calculating the aggregate amount of all the votes for each office that shall have been given in all of the election districts of the county for every person voted for such office. For this purpose, the Court shall utilize the voting machine recording tapes, voting machine certificates, absentee vote tally sheets and write-in vote tally sheets for each election district provided by the Prothonotary and the Department of Elections for its county, whose representatives shall sit as observers and assistants to the Court during said calculation of the vote.
Florida	Florida Statutes Title IX §102.071 Conducting elections and ascertaining the results: Tabulation of votes and proclamation of results.—**The election board shall post at the polls, for the benefit of the public, the results of the voting for each office or other item on the ballot as the count is completed**. Upon completion of all counts in all races, a certificate of the results shall be drawn up by the inspectors and clerk at each precinct upon a form provided by the supervisor of elections which shall contain the name of each person voted for, for each office, and the number of votes cast for each person for such office; and, if any question is submitted, the certificate shall also contain the number of votes cast for and against the question. The certificate shall be signed by the inspectors and clerk and shall be delivered without delay by one of the inspectors, securely sealed, to the supervisor for immediate publication. All the ballot boxes, ballots, ballot stubs, memoranda, and papers of all kinds used in the election shall also be transmitted, after being sealed by the inspectors, to the supervisor's office. Registration books and the poll lists shall not be placed in the ballot boxes but shall be returned to the supervisor. Title IX §102.112 Deadline for submission of county returns to the Department of State. (2) Returns must be filed by 5 p.m. on the 7th day following a primary election and by noon **on the 12th day following the general election**.
Georgia	§21-2-493As the returns from each precinct are read, computed, and found to be correct or corrected as aforesaid, they shall be recorded on the blanks prepared for the purpose until all the returns from the various precincts which are entitled to be counted shall have been duly recorded; then they shall be added together, announced, and attested by the assistants who made and computed the entries respectively and shall be signed by the superintendent. The consolidated returns shall then be

	certified by the superintendent in the manner required by this chapter. Such returns shall be **certified by the superintendent not later than 5:00 P.M. on the seventh day following the date on which such election was held** and such returns shall be immediately transmitted to the Secretary of State.
Hawaii	No later than 4:30 p.m. on the last day in the month of the election or as soon as returns received from all counties
Idaho	County-level: §34-1205: The county board of commissioners shall be the county board of canvassers and the county clerk shall serve as their secretary for this purpose. The county board of canvassers shall meet within seven (7) days after the primary election **and within ten (10) days after the general** election for the purpose of canvassing the election returns of all precincts within the county. County-level: §34-1205: Immediately after the general election canvass, the county clerk shall issue a certificate of election to the county candidates who received the highest number of votes for that particular office and they shall be considered duly elected to assume the duties of the office for the next ensuing term. State-level: On or before the second Wednesday in December next after such election
Illinois	Within 31 days after holding the election
Indiana	County-level: IC 3-12-5-7: Not **later than noon on the second Monday** following an election, each circuit court clerk shall prepare a certified statement under the clerk's seal of the number of votes received by each candidate for … federal office. State-level: Upon receipt of the certified statements from the circuit court clerks under section 6 of this chapter **and not later than noon of the last Tuesday in November**, the election division shall tabulate the number of votes cast for each candidate for … presidential electors.
Iowa	Precinct-level: §43.46: The precinct election officials **shall deliver all election supplies, by noon of the day after the close of the polls, to the commissioner** who shall carefully preserve them and deliver the returns in the condition in which received except as is otherwise required by sections 50.20 to 50.22, to the county board of supervisors State-level: At the expiration of 10 days after the completed canvass
Kansas	State-level: Before the first Wednesday in December next after such election
Kentucky	County-level: §117.355: **Within thirty (30) days after** any primary or general election, the county board of elections shall transmit the information required by KRS 117.274(4) to (7) State-level: State Board shall meet to count when all the returns are in or no later than the third Monday after the election
Louisiana	Parish-level: RS 18:574: The board shall complete the compilation of the election returns **and file one copy of the compiled statement with the clerk of court no later than 4:00 p.m. on the fourth day after the election. One copy of the compiled statement shall be postmarked no later than 12:00 noon on the fifth day after the election and mailed to the secretary of state.** The clerk of court shall transmit the election returns as shown by the compiled statement from the parish

	board of election supervisors to the secretary of state no later than 12:00 noon on the fifth day after the election. In a parish containing a municipality with a population of three hundred thousand or more, the parish board of election supervisors shall transmit the election returns as shown by their compiled statement to the secretary of state no later than 12:00 noon on the fifth day after the election. Failure to comply with these time limits shall not void the election. State-level: On or before the 12th day after the general election
Maine	Local-level: 21-A §711: The clerk shall record the attested copies of the election return with the Secretary of State **within 3 business days after election day**. State-level: Within 20 days after the election.
Maryland	Within 35 days of the election
Massachusetts	Within 10 days after they have been transmitted to the Secretary of State
Michigan	County-level: The board shall then proceed without delay to canvass the returns of votes cast for all candidates for offices [...] and shall conclude such canvass at the earliest possible time and **in every case within 14 days** State-level: On or before the 20th day after the election and no later than the 40th day
Minnesota	County-level: §204C.37 The copy of the canvassing board report and the precinct summary statements must be sent by express mail or delivered to the secretary of state. **If the copy is not received by the secretary of state within ten days following the applicable election**, the secretary of state shall immediately notify the county auditor, who shall deliver another copy to the secretary of state by special messenger. State-level: On the second Tuesday after each state general election the state canvassing board shall open and canvass the returns
Mississippi	County-level: The commissioners of election shall, with in ten (10) days after the general election, transmit to the Secretary of State, to be filed in his office, a statement of the whole number of votes given in their county and the whole number of votes given in each precinct in their county State-level: Within 30 days after the date of the election
Missouri	Local-level: §115.507.1: Not later than the second Tuesday after each election at which the name of a candidate for nomination or election to the office of president of the United States, United States senator, representative in Congress, governor, lieutenant governor, state senator, state representative, judge of the circuit court, secretary of state, attorney general, state treasurer, or state auditor, or at which an initiative, referendum, constitutional amendment or question of retaining a judge subject to the provisions of article V, section 29* of the state constitution, appears on the ballot in a jurisdiction, the election authority of the jurisdiction shall mail or deliver to the secretary of state the abstract of the votes given in its jurisdiction, by polling place or precinct, for each such office and on each such question." §115.507.4: "Not later than the second Tuesday after the election, the verification board shall issue a statement announcing the results of each election held within its jurisdiction and shall certify the returns to each political subdivision and special district submitting a candidate or

	question at the election."The clerks shall, within eight days after they receive the returns, certify and transmit them to the Governor
Montana	Local-level: §13-15-301: Immediately after the returns are canvassed, the election administrator shall file the pollbooks, election records, and papers delivered to the board of canvassers… State-level: §13-15-502: **Within 20 days after the election**, or sooner if the returns are all received, the state auditor, superintendent of public instruction, and attorney general shall meet as a board of state canvassers in the office of the secretary of state and determine the vote. The secretary of state shall serve as secretary of the board, keep minutes of the meeting of the board, and file them in the official records of his office.
Nebraska	County-level: §32-1034: Immediately upon the completion of the canvass by the county canvassing board, the election commissioner or county clerk shall prepare an abstract of votes for all officers and issues certified to the election commissioner or county clerk by the Secretary of State." §32-1035: "If the Secretary of State has not received the abstract of votes from any county by the third Monday after the day of election, the Secretary of State may send a messenger to the election commissioner or county clerk of such county at the expense of such county." State-level: Within 40 days
Nevada	County-level: §293.387.3: The county clerk shall, as soon as the result is declared, enter upon the records of the board an abstract of the result and […] transmit them to the Secretary of State **not more than 7 working days after the election.** State-level: Must be completed within 20 days
New Hampshire	§659:73 General Content of Return. The election return forms **shall be submitted on paper and electronically immediately after the completion of the vote count** in the manner prescribed by the secretary of state. The return of votes shall include, but not be limited to: (a) The name of each candidate printed on the ballot and the number of votes that candidate received for the listed office including any write-in votes for the same office on the same ballot where the voter did not mark the printed candidate name. §659:74 Preparing Return. The town or ward clerk shall prepare the election return in duplicate on the forms supplied by the secretary of state and shall sign and shall certify such returns. §659:75 Forwarding; Retaining Copies of Return. One copy of the election return shall be forwarded by the town or ward clerk to the secretary of state in both paper and electronic **form no later than 8:00 a.m. on the day following a state election** unless the secretary of state orders them at a different time and date. The other shall be kept by the town or city clerk in accordance with RSA 33-A:3-a and shall be open to public inspection at reasonable times. §659:81 Canvass and Declaration Generally. Except as provided in §RSA 659:82, when the secretary of state has received the returns for an office from all towns or wards comprising the elective district for that

	office, he shall examine, record and total such returns and shall declare elected to the office the same number of persons as the number of officers to which the district is entitled; provided that those persons declared officers-elect shall be those persons who received the highest number of votes cast for said office.
New Jersey	No later than the 28th day after the election
New Mexico	County-level: §1-13-13: The county canvassing board shall complete the canvass of the returns and declare the results **within ten days** from the date of the election. State-level: On the third Tuesday after each election, state board will meet to canvass and declare the results of the election
New York	§9-214: The board of elections shall transmit … a certified copy of the statement of the canvassing board relating to the offices of electors of president and vice president of the United States … **within twenty-five days after the election**
North Carolina	County-level: §163-182.5: The county board of elections shall **meet at 11:00 A.M. on the tenth day after every election** held on the same day as a general election in November of the even-numbered year
North Dakota	Within ten days and before 4 p.m. on the tenth day following any general election
Ohio	Ohio Revised Code, Title 32, §3505.32: "Boards of elections may begin the official canvass of the general election no earlier than the 11th day after the election, and must begin no later than the 15th day after the election. Each board of elections must complete its official canvass and certify no later than the 21st day after the election.
Oklahoma	§26-7-136: The county election board shall use such precinct returns to certify the results of such election for county officers and questions and shall transmit electronically or in writing as prescribed by the Secretary of the State Election Board **after 5 p.m. on Friday following the election** to the State Election Board the completed county returns for all state officers and questions. … The State Election Board shall use such county returns to certify the results of such election for all state officers and questions after **5 p.m. on Tuesday next succeeding the election.**
Oregon	County-level: §255.295: Not later than the **20th day after the date of an election**, the county clerk shall prepare an abstract of the votes and deliver it to the district elections authority State-level: No later than the 30th day after any election
Pennsylvania	2004 Act 97 §302 (k): No later than the third Monday following the primary or election
Rhode Island	State board shall commence the canvass at 9:00 p.m. on election day and shall continue and complete the tabulation with all reasonable expedition
South Carolina	County-level: §7-17-20The county board of canvassers, respectively, shall then proceed to canvass the votes of the county and make such statements of such votes as the nature of the election shall **require no later than noon on the Saturday next following the election** and at such time shall transmit to the State Board of Canvassers the results of their findings." State-level: State board shall meet within 10 days after any general election
South Dakota	County-level §12-20-36: Within **six calendar days after the close of**

	any election, the officer in charge of the election, with the assistance of a majority of the governing board as the canvassing board, shall make the canvass of votes." State-level §112-20-47 "Within **seven days after the day of election**, the Board of State Canvassers shall open and examine the returns from each county. However, if the returns from each county have not been received, the board may adjourn, **not exceeding ten days**, for the purpose of obtaining the returns from each county. The board shall proceed with the canvass after the returns have been received from each county."
Tennessee	§2-8-101 (a) Meeting of county election commission following election: "The county election commission shall meet at its office upon completion of its duties under §2-8-104, but no later than **the third Monday after the election** to compare the returns on the tally sheets, to certify the results as shown by the returns in writing signed by at least the majority of them, and to perform the duties prescribed by this chapter.
Texas	§68.032 Delivery of Returns and Voted ballots: The copy of the returns required to be delivered to the county clerk shall be delivered **not later than two hours, or as soon thereafter as practicable, after the closing of the polls** or after the last person voted, whichever is later. . . §68.034 Transmission of Results to Secretary of State. The county clerk shall transmit periodically, by telephone or other electronic means, to the secretary of state the results for the races being tabulated by the secretary. The results shall be transmitted continuously until complete. (b) The county clerk shall transmit the complete or partial results of the early voting for the appropriate races **at 7 p.m. on election day**. If only partial results are available, the results shall be transmitted periodically until complete.
Utah	County-level §20A-4-301 (ii)(b): The board of county canvassers shall meet to canvass the returns at the usual place of meeting of the county legislative body, at a date and time determined by the county clerk that **is no sooner than seven days after the election and no later than 14 days after the election.** State-level: Fourth Monday of November at noon
Vermont	Canvassing committee shall meet at 10:00 A.M. one week after the day of the election
Virginia	Fourth Monday in November, if the Board is unable to ascertain results on that day, the meeting shall stand adjourned for not more than three days
Washington	Not later than 30 days after the election
West Virginia	County-level §3-6-9 "(a) The commissioners of the county commission shall be ex officio a board of canvassers and, as such, shall keep in a well-bound book, marked "election record", a complete record of all their proceedings in ascertaining and declaring the results of every election in their respective counties. (1) They shall convene as the canvassing board at the courthouse on the **fifth day** (Sundays excepted) after every election held in their county, or in any district of the county, and the officers in whose custody the

	ballots, pollbooks, registration records, tally sheets and certificates have been placed shall lay them before the board for examination."
Wisconsin	County-level §7.60(5)(a): The county clerk shall deliver or transmit the certified statement to the government accountability board no later than 7 days after each primary except the September primary, no later than 10 days after the September primary and any other election except the general election, and **no later than 14 days after the general election**. State-level: The first day of December following a general election
Wyoming	County-level §22-16-103 (c)(i): The county canvassing board shall: Meet as soon as all returns have been received and abstracted, but if any provisional ballots have been cast in the county, not before the time has passed for provisional voters to document their eligibility to register or to vote. The board shall meet at a time and place designated by the county clerk, but no later than the first Friday following the election" §22-16-107 "The certified results of the county canvass shall be posted in the office of the county clerk and copies made available to interested persons."

Federal Statutory Deadlines

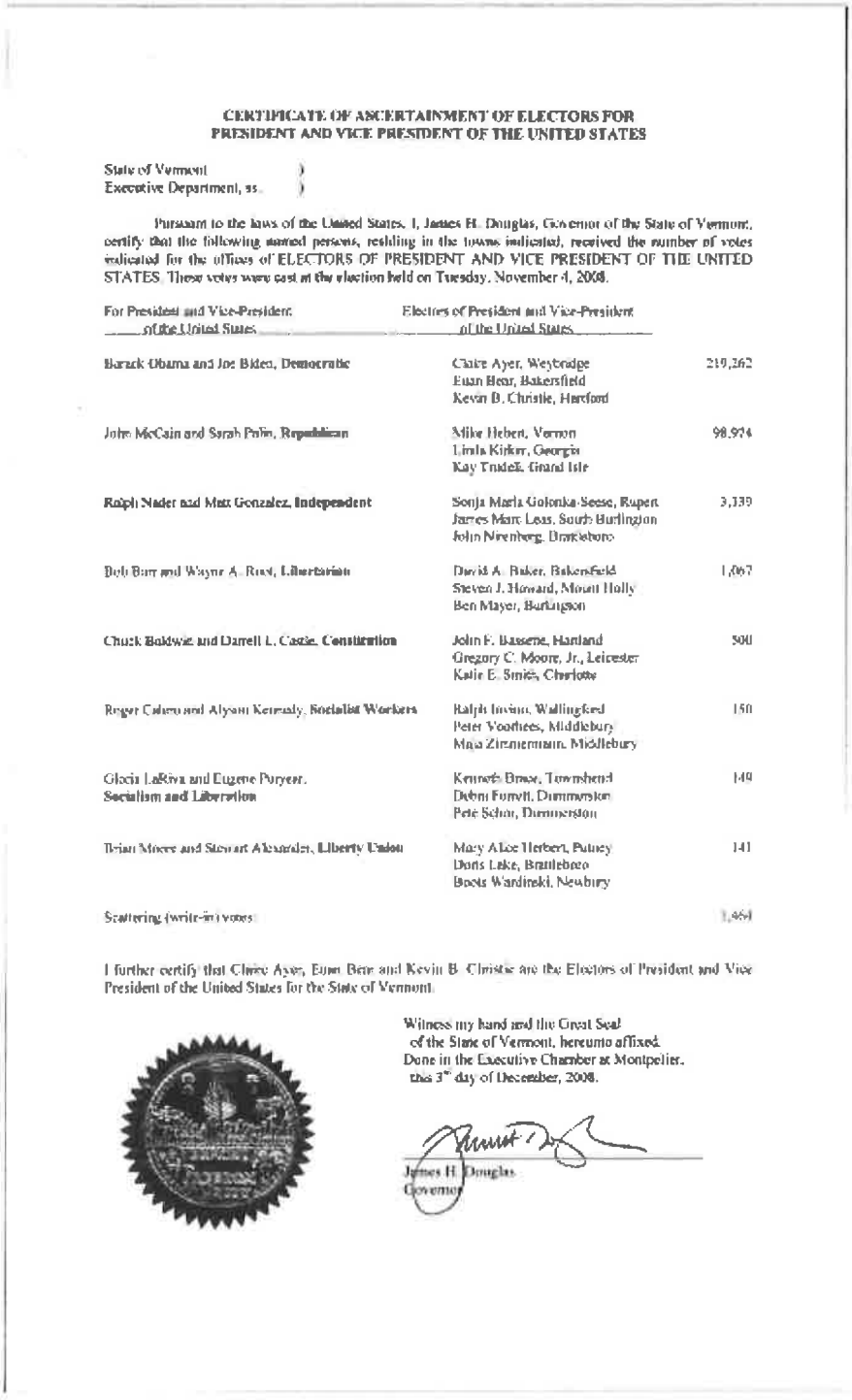
Federal law requires completion of the vote tally for President *prior* to the meeting of the Electoral College. Specifically, federal law requires the *delivery* to the presidential electors of six copies of a "Certificate of Ascertainment" containing the official count (the "canvass") of the number of popular votes cast for each candidate for President prior to their meeting. Indeed, the "Certificate of Ascertainment" containing the official count is the evidence supporting the presidential electors' right to vote at the meeting of the Electoral College in mid-December.

Section 6 of Title 3 of the United States Code requires:

> "It shall be the duty of the executive of each State, as soon as practicable after the conclusion of the appointment of the electors in such State by the final ascertainment, under and in pursuance of the laws of such State providing for such ascertainment, to communicate by registered mail under the seal of the State to the Archivist of the United States **a certificate of such ascertainment** of the electors appointed, setting forth the names of such electors and **the canvass or other ascertainment under the laws of such State of the number of votes given or cast** for each person for whose appointment any and all votes have been given or cast; and it shall also thereupon be the duty of the executive of each State to **deliver to the electors of such State, on or before the day on which they are required by section 7 of this title to meet, six duplicate-originals of the same certificate under the seal of the State**; and if there shall have been any final determination in a State in the manner provided for by law of a controversy or contest concerning the appointment of all or any of the electors of such State, it shall be the duty of the executive of such State, as soon as practicable after such determination, to communicate under the seal of the State to the Archivist of the United States a certificate of such determination in form and manner as the same shall have been made; and the certificate or certificates so received by the Archivist of the United States shall be preserved by him for one year and shall be a part of the public records of his office and shall be open to public inspection; and the Archivist of the United States at the first meeting of Congress thereafter

shall transmit to the two Houses of Congress copies in full of each and every such certificate so received at the National Archives and Records Administration. [Emphasis added]

For illustration, Vermont's 2008 Certificate of Ascertainment is shown below:



CERTIFICATE OF ASCERTAINMENT OF ELECTORS FOR PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES

State of Vermont)
Executive Department, ss.)

Pursuant to the laws of the United States, I, James H. Douglas, Governor of the State of Vermont, certify that the following named persons, residing in the towns indicated, received the number of votes indicated for the offices of ELECTORS OF PRESIDENT AND VICE PRESIDENT OF THE UNITED STATES. These votes were cast at the election held on Tuesday, November 4, 2008.

For President and Vice-President of the United States	Electors of President and Vice-President of the United States	
Barack Obama and Joe Biden, Democratic	Claire Ayer, Weybridge Euan Bear, Bakersfield Kevin B. Christie, Hartford	219,262
John McCain and Sarah Palin, Republican	Mike Hebert, Vernon Linda Kirker, Georgia Kay Trudell, Grand Isle	98,974
Ralph Nader and Matt Gonzalez, Independent	Sonja Maria Golonka-Seese, Rupert James Marc Leas, South Burlington John Nirenberg, Brattleboro	3,339
Bob Barr and Wayne A. Root, Libertarian	David A. Baker, Bakersfield Steven J. Howard, Mount Holly Ben Mayer, Burlington	1,067
Chuck Baldwin and Darrell L. Castle, Constitution	John F. Bassene, Hartland Gregory C. Moore, Jr., Leicester Katie E. Smith, Charlotte	500
Roger Calero and Alyson Kennedy, Socialist Workers	Ralph Irwin, Wallingford Peter Voorhees, Middlebury Maia Zimmermann, Middlebury	150
Gloria LaRiva and Eugene Puryear, Socialism and Liberation	Kenneth Braze, Townshend Debra Forsyth, Dummerston Pete Schur, Dummerston	149
Brian Moore and Stewart Alexander, Liberty Union	Mary Alice Herbert, Putney Doris Lake, Brattleboro Boots Wardinski, Newbury	141
Scattering (write-in) votes		1,464

I further certify that Claire Ayer, Euan Bear and Kevin B. Christie are the Electors of President and Vice President of the United States for the State of Vermont.

Witness my hand and the Great Seal of the State of Vermont, hereunto affixed. Done in the Executive Chamber at Montpelier, this 3rd day of December, 2008.

James H. Douglas
Governor

Sean Parnell envisions a hypothetical scenario in which the national popular vote count for President might be "unavailable" prior to the meeting of the Electoral College.

> "There's little reason to believe that non-compact states will … ensure all the votes are counted by the deadline. They may very well decide that it is in their interest to frustrate National Popular Vote, and **not finalize their vote counts until well after their electors have met and voted**…."[4] [Emphasis added]

Parnell apparently believes that the rogue state official can have his cake and eat it too.

Parnell does not seem to realize that the presidential electors in the rogue state official's own state cannot cast their votes in the Electoral College until they have been certified by their own state as having been elected to the position of presidential elector. If the vote counts are not certified in the rogue official's own state, then there would be no presidential electors in the rogue official's own state. It is the numerical vote count contained in the Certificate of Ascertainment that establishes the presidential electors' right to vote. It is thus impossible to "finalize [the] vote count until well after their electors have met and voted." In short, the rogue official's attempt to "frustrate" the National Popular Vote Compact means disenfranchising the voters of his own state.

Needless to say, voters in the rogue official's own state (and, in particular, voters who voted for the presidential candidate who would be disadvantaged by the rogue official) would object to being disenfranchised on the whim of the rogue official. A ministerial official does not have the power to negate the votes of every voter in his state by preventing the casting of a state's electoral votes simply because he wants to "frustrate" the National Popular Vote Compact. These voters in the rogue official's own state would cite Section 6 of Title 3 of the United States Code requiring the delivery of six copies of the Certificate of Ascertainment to the presidential electors *prior* to the meeting of the Electoral College because it is this certification that enables the presidential electors to take their seats and vote in the Electoral College.

In addition, Sean Parnell both selectively and inaccurately quoted the above federal law (section 6 of Title 3 of the United States Code) in his testimony to the Rhode Island House Judiciary Committee:

> "States are not required to count all ballots by the so-called Safe Harbor date, six days before electors meet. Nor are they required to submit their Certificates of Ascertainment by that date. In fact the states are not required to send in their Certificates of Ascertainment until such time as is (I'm taking the word from U.S. Code Title 3, Section 6) "practicable" after the meeting of electors. And they are not due to the Archivist of the United States until 10 days after the electors meet."[5]

Parnell's testimony is misleading because he *selectively* focuses only on the *extra seventh copy* of a state's presidential count that is to be "sent in" to the National Archivist. In fact, no one cares when this seventh copy is "sent in" to the Archivist, much less when the Archivist actually receives it. The important point is that section 6 specifically requires six *original copies* of the

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[4] Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

[5] Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

Certificate of Ascertainment be *delivered* to the state's presidential electors *prior* to the meeting of the Electoral College.

In addition, Parnell's testimony is misleading because he *deceptively* misquotes the federal statute concerning the irrelevant seventh copy of the Certificate of Ascertainment The statute does not say that the states are required to send in their Certificates of Ascertainment at "such time as is ... 'practicable' *after the meeting of electors*." Instead, the statute actually says that the Certificates are to be sent in "as soon as practicable *after [the final] determination*" of the presidential count. The "final determination" is an event that typically occurs far more than six days *before* the meeting of electors (on November 28, 2012, in the case of Connecticut). By misquoting the statute, Parnell tries to convey the impression that the critical event is when the irrelevant seventh copy of the Certificate of Ascertainment is dropped in the mail, whereas the critical event is the state's "final determination" of the vote count.

Tools Provided by the National Popular Vote Compact

Sean Parnell seems to think that the states belonging to the National Popular Vote Compact would sit passively by while a rogue state official unilaterally attempted to "frustrate" the casting of their state's electoral votes by failing to finalize the presidential vote from the rogue official's state.

Indeed, the political context for Sean Parnell's hypothetical scenario would be that the rogue state official was attempting to throw the election to the *second-place* presidential candidate after a nationwide presidential campaign had been run, over a period of many months, and in which the candidates and the public all thought that the winner would be the candidate who received the most popular votes in all 50 states (and D.C.).

In fact, the National Popular Vote Compact arms the compacting states with ample tools to guarantee that all of their electoral votes will indeed be cast, and be cast in favor of the presidential candidate who received the most popular votes in all 50 states (and D.C.).

The first clause of Article III of the National Popular Vote Compact provides:

> "Prior to the time set by law for the meeting and voting by the presidential electors, the chief election official of each member state shall **determine** the number of votes for each presidential slate in each State of the United States and in the District of Columbia in which votes have been cast in a statewide popular election and shall add such votes together to produce a 'national popular vote total' for each presidential slate." [Emphasis added]

As will be seen below, in normal circumstances the National Popular Vote Compact gives the compacting states no discretion as to how to "determine" the vote count for a particular state, whereas, in other circumstances, the compacting states have a certain amount of discretion.

Compacting States

For compacting states, the process is especially straight-forward. The fourth clause of Article III of the National Popular Vote Compact requires issuance by a compacting state of an "official statement" of the state's "final determination" of its presidential vote prior to the federal "safe harbor" date.

> "At least six days before the day fixed by law for the meeting and voting by the presidential electors, each member state shall make a final determination of the number of popular votes cast in the state for each presidential slate and shall

communicate an official statement of such determination within 24 hours to the chief election official of each other member state."

The above six-day deadline corresponds to the deadline contained in the "safe harbor" provision of federal law (section 5 of Title 3, chapter 1 of the United States Code). The phrase "final determination" in this clause corresponds with the term used in section 5 of federal law.

Thus, the fourth clause of Article III of the compact is a state statutory requirement that each compacting state must comply with the federal "safe harbor" deadline. Although the National Popular Vote Compact does not specify the exact form of the "official statement," the "official statement" would undoubtedly, in practice, simply be an additional copy of the Certificate of Ascertainment that the state is already required to issue under section 6 of Title 3, chapter 1 of the United States Code.

Non-Compacting States

The process of determining the presidential vote count for non-compacting states would be entirely routine on occasions when the officials of non-compacting states comply with their own state law and comply with sections 5 and 6 of federal law—as, indeed, 100% of the states have done since enactment of the existing federal procedures shortly after the disputed 1876 presidential elections.

If the officials of non-compacting states comply with state and federal law and issue their Certificate of Ascertainment, the fifth clause of Article III of the National Popular Vote Compact gives the compacting states *no discretion* as to how to "determine" the presidential vote count from those states:

> "The chief election official of each member state **shall treat as conclusive** an official statement containing the number of popular votes in a state for each presidential slate made by the day established by federal law for making a state's final determination conclusive as to the counting of electoral votes by Congress." [Emphasis added]

In other words, the National Popular Vote Compact gives deference—in the same way as the current system gives deference—to each state's "final determination" made by the "safe harbor" date (six days before the meeting of the Electoral College).

However, the National Popular Vote Compact does not depend on any particular piece of paper. The officials administering the National Popular Vote Compact in the compacting states have a statutory obligation to ensure that their own state's electoral votes are cast, and that they are cast in favor of the presidential candidate who received the most popular votes in all 50 states (and D.C.). The "final determination" of a state's presidential vote does not have to come in the form of the Certificate of Ascertainment. It could just as well be evidenced by, say, the official minutes of the state board of canvassers or any other official document from the state containing the vote count.

As previously mentioned, within a couple of days after Election Day, *official documents* containing the vote tallies of a presidential election exist in at least two separate places in every state, namely

- at the level of local government where the votes were actually counted, and
- at the state office to which the local returns were transmitted.

Thus, if a rogue state official attempted to withhold certification of the statewide vote tally in order to attempt to throw the presidential election to the *second-place* presidential candidate, the officials administering the National Popular Vote Compact in the compacting states would undertake their own good faith effort to "determine" the presidential vote count in the rogue state official's state.

One option available to officials administering the National Popular Vote Compact in the compacting states would be to acquire the *official* documents containing the local-level vote tallies that are already residing at the state's designated central location in compliance with state law.

A second option available to officials administering the National Popular Vote Compact in the compacting states would be to acquire the *official* documents from the intermediate level of government that aggregated the election returns from the individual precincts in its area. In most states, this would be the minutes from the country board of canvassers (or equivalent body). In Connecticut, it would be the documents created by the town clerks no later than 21 days after the election (as per §9-322a).

It should be emphasized that the above theoretical options are never going to occur, because federal law alone precludes Sean Parnell's hypothetical scenario in which a rogue state official attempted to throw the presidential election to the *second-place* presidential candidate by unilaterally trying to withhold his state's "official" vote tally.

However, as a parlor game, let us consider what would happen under these unlikely scenarios.

The rogue state official would undoubtedly whine that this process was "less official" than usual.

The rogue state official (or, more precisely, allies of the second-place candidate located in the compacting states) would contemplate suing the officials of the compacting states in order to dispute their use of one of the above options. Of course, where there is no harm, there is no foul. A "less official" official vote tally is still official. More importantly, a "less official" official vote tally is only harmful if it is inaccurate in some way—in particular, if it harms a particular presidential candidate. The burden of proof on potential plaintiffs would be to demonstrate either (1) that the officials administering the compact incorrectly added up the numbers found in the official documents or (2) that the official numbers were incorrect. We can safely assume that officials administering the compact know how to add. Thus, anyone contemplating a lawsuit would immediately realize that the necessary evidence of the correct vote tally from the rogue official's non-compacting state would be the official certification of the vote tally that the rogue official was unilaterally withholding for partisan purposes. To win their lawsuit and stop the official administering the compact from "determining" the vote count under one of the above options, the plaintiffs would need the rogue official to release the official presidential vote count! At that point, the officials administering the National Popular Vote Compact would, of course, use it.

Enhanced Value of Votes Cast in the Rogue Official's State

The vote cast by a voter in a non-compacting state acquires additional value because of the existence of the National Popular Vote Compact (even though that voter's state has not adopted the compact). Specifically, a vote cast by a voter in a non-compacting state counts towards the national popular vote total which will determine how the compacting states cast their electoral

votes. Given that the legislature of the rogue state has permitted its voters to vote for President, those voters have an inherent right to have the full value of their vote reflected in the choice of the President—that is, they have a right to have their state's vote count finalized in a timely manner so that their vote can help determine how the compacting states cast their electoral votes.

Thus, voters of the rogue official's state could sue to force the rogue official to issue an "official" count for their state. The U.S. Supreme Court has long recognized that a state need not permit its voters to vote for President; however,

> "when the state legislature vests the right to vote for President in its people, the right to vote ... is fundamental."[6]

The 2000 Presidential Election

It should be noted that the nation has historical experience indicating that there is no such thing as rogue state officials who unilaterally attempt to prevent the casting of their own state's electoral votes for partisan reasons.

It should be noted that the U.S. Constitution does not require that a candidate obtain a majority of the electoral votes (that is, 270 of 538) in order to be elected President. Instead, the 12th Amendment states:

> The person having the greatest number of votes for President, shall be the President, if such number be a majority of the whole number of Electors **appointed**." [Emphasis added]

Thus, if a state fails to appoint its presidential electors, the number of electoral votes required for election is reduced.[7]

In 2000, George W. Bush received 271 electoral votes (counting the 25 that he received from Florida) and Al Gore won 267 electoral votes. A majority of 270 (of 538) was required for election.

In 2000, there were eight states that George W. Bush carried under the current state-by-state winner-take-all system; that had a Democratic Secretary of State; and that had enough electoral votes (five or more) which, if not cast, would have elected Al Gore as President (even after Bush received all 25 of Florida's electoral votes). Those states were Al Gore's home state of Tennessee, Bill Clinton's home state of Arkansas, Georgia, Kentucky, Mississippi, Missouri, North Carolina, and West Virginia.

If Sean Parnell's hypothetical scenario were legally permissible, it would have occurred in 2000 under the *current* state-by-state winner-take-all system.

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[6] *Bush v. Gore*. 2000. 146 U.S. 1, 35.

[7] There have been several occasions when a state failed to appoint its presidential electors. For example, New York did not appoint presidential electors in 1789 because the two houses of the legislature could not agree on how to appoint them. Notably, the Southern states did not appoint presidential electors in the 1864 election during the Civil War.

The delayed vote count in New York in 2012 due to Hurricane Sandy

In his testimony to the Rhode Island House Judiciary Committee, Sean Parnell inaccurately described the unique "no harm–no foul" situation that developed in New York state after Hurricane Sandy in 2012.

> "In the 2012 election, the state of New York submitted its Certificate of Ascertainment on December 10th, but did not certify its election results until December 31st. In the certified results, President Obama gained more than 300,000 additional votes on top of the total given in the Certificate of Ascertainment. And Governor Romney gained more than 80,000 additional votes. Under our current system, because President Obama had very clearly won the state of New York, the 380,000 votes not included in the Certificate of Ascertainment, did not make a difference. But had NPV been in effect, and the election had been close, such as in 1960 and 2000, the vote counting delay would have been crucial...."[8]

The facts are that, just before Election Day in 2012, Governor Cuomo issued an executive order permitting any voter in the federally-declared disaster area (New York City and suburbs) to cast a provisional ballot at ***any*** polling place in the state. The result was 400,629 provisional ballots—about four times the state's usual number of provisional ballots. Under the best circumstances, counting provisional ballots is a time-consuming and labor-intensive task. Normally provisional ballots are cast in the voter's own precinct (or occasionally in a neighboring precinct). Because these 400,629 voters were scattered around the state, most of these 400,629 paper ballots did not contain the names of candidates for congressional, state legislative, judicial, and local offices appropriate for the voter's actual home precinct. Thus, it was necessary to make a separate determination, office-by-office, of the voter's eligibility to vote for each of these 400,629 provisional ballots. For example, if the voter was temporarily living somewhat close to his actual home, he might still be in his own congressional district, but not in his own state legislative district. It was clear on Election Night that 400,629 votes in New York could not possibly affect Obama's winning New York's electoral votes (or, for that matter, Obama's nationwide lead of several million votes).

In this "no harm–no foul" situation (with no aggrieved or affected party), the bipartisan State Board of Elections decided not to divert governmental personnel who were already stretched thin because of urgent hurricane relief to the task of unraveling the complicated situation created by the unexpected 400,629 provisional ballots. Instead, they approved a vote count prior to the meeting of the Electoral College that did not include the 400,629 provisional ballots. A few weeks later, the Board issued a corrected count that included the 400,629 provisional ballots.

Douglas A. Kellner, Co-Chair of the New York State Board of Elections has stated:

> "If the final New York count had been required to determine the identity of the President, the New York State Board of Elections would have accelerated its official count—regardless of whether the outcome of the election was being determined by the state-level winner-take-all rule or the national popular vote."

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[8] Hearing on the National Popular Vote bill (Rhode Island bill H5575) at the House Judiciary Committee. Providence, Rhode Island. March 12, 2013.

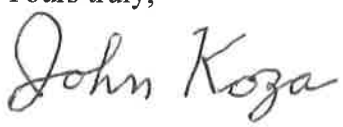
In other words, if the 400,629 provisional ballots had been relevant to determining the identity of the President—under either the current system (if New York had been a closely divided "battleground" state) or under the National Popular Vote Compact (if the nationwide vote was closely divided)—the Board would have done the obvious thing and deployed the required number of personnel to promptly count all the votes.

On the other hand, if the National Popular Vote Compact had been in effect in November 2012, the New York State Board of Elections conceivably could have made the same decision that it actually made in the unique situation in 2012, namely to defer counting of the 400,629 provisional ballots (because these ballots would not possibly have affected Obama's nationwide lead of almost five million votes).

Of course, the current state-by-state winner-take-all system is more susceptible to a result-altering problem created by a hurricane than the national popular vote system. The 2000 presidential election was determined by 537 votes in a hurricane-prone battleground state (Florida). If Hurricane Sandy had hit a closely-divided "battleground" state that was crucial in determining the national outcome under the current state-by-state winner-take-all system (such as North Carolina, Pennsylvania, Virginia, or Florida), state officials would not have had the option of deferring the count of their provisional ballots.

Please call me if you have any questions or would like to discuss this matter further.

Yours truly,



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National Popular Vote
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National Popular Election of the President

National Popular Vote!

www.NationalPopularVote.com

"Agreement among the States to Elect the President by National Popular Vote"

July 3, 2018

The National Popular Vote bill would guarantee the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia. The bill would ensure that every vote will be equal throughout the U.S. and that ***every*** vote, in ***every*** state, will matter in ***every*** presidential election.

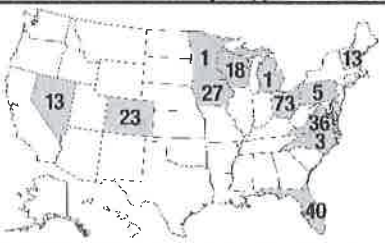
Since 2006, the bill has been enacted into law in 12 states possessing 172 electoral votes, including 4 small jurisdictions (RI, VT, HI, DC), 4 medium-sized states (CT, MD, MA, WA), and 4 large states (NJ, IL, NY, CA). The bill will take effect when enacted by states with 98 more electoral votes. The bill has already passed at least one chamber in 11 additional states with 89 more electoral votes, including approvals by the New Mexico Senate, Oregon House, Arizona House, Oklahoma Senate, and unanimous committee votes in two other states (GA, MO). A total of 3,125 state legislators from all 50 states have endorsed it.

The shortcomings of the current system of electing the President stem from "winner-take-all" laws that have been enacted by state legislatures in 48 states. These laws award all of a state's electoral votes to the candidate receiving the most popular votes in each state.

Because of these state winner-take-all laws, five of our 45 Presidents have come into office without winning the most popular votes nationwide. Near-misses are also common. In 2004, a shift of 59,393 votes in Ohio would have defeated President George W. Bush despite his nationwide lead of over 3,000,000 votes. The national popular vote winner would also have been defeated by a shift of 9,246 votes in 1976, a shift of 77,726 in 1968, a shift of 9,212 in 1960, a shift of 20,360 in 1948, or a shift of 1,711 votes in 1916.

Another effect of state winner-take-all laws is that presidential candidates have no reason to campaign in, advertise in, or pay attention to voters in states where they are safely ahead or hopelessly behind. In 2012, ***all*** of the general-election campaign events and virtually all expenditures were concentrated in the 12 states where Romney's support was between 45% and 51%. Two-thirds of the events (176 of 253) were in just 4 closely divided "battleground" states (OH, FL, VA, IA). Thirty-eight states were ignored, including 12 of the 13 smallest states and almost all rural, agricultural, Western, Southern, and New England states. Similarly, in 2016, almost all campaign events (94%) were in the 12 states where Trump's support was between 43% and 51%. Two-thirds of the events (273 of 399) were in 6 states (OH, FL, VA, NC, PA, MI).

Concentration of Campaign Events in 2012



Concentration of Campaign Events in 2016

The U.S. Constitution (Article II, Section 1) gives states exclusive control over awarding their electoral votes: "Each State shall appoint, in such Manner as the Legislature thereof may direct, a Number of Electors…." The winner-take-all method of awarding electoral votes is state law. It is ***not*** in the U.S. Constitution. It was not debated at the 1787 Constitutional Convention or mentioned in the *Federalist Papers*. It was used by only three states in the first presidential election (and all three repealed it by 1800). It was not until the 11th presidential election (1828) that even half the states used winner-take-all laws.

The National Popular Vote interstate compact will go into effect when enacted by states possessing a majority of the electoral votes—that is, enough to elect a President (270 of 538). At that time, all of the presidential electors from all of the compacting states will be supporters of the presidential candidate who received the most popular votes in all 50 states and DC. Because the compacting states possess at least 270 electors, the President will be the candidate receiving the most popular votes in all 50 states and DC.

The National Popular Vote bill retains the Electoral College and preserves state control of elections.

For additional information, see our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (downloadable for free at www.NationalPopularVote.com).

Total Presidential Vote 1960–2016

Election	Democratic	Republican
1960	34,226,731	34,108,157
1964	43,129,566	27,178,188
1968	31,275,166	31,785,480
1972	29,170,383	47,169,911
1976	40,830,763	39,147,793
1980	35,483,883	43,904,153
1984	37,577,185	54,455,075
1988	41,809,074	48,886,097
1992	44,909,326	39,103,882
1996	47,402,357	39,198,755
2000	50,992,335	50,455,156
2004	59,028,111	62,040,610
2008	69,456,898	59,934,814
2012	65,897,727	60,930,782
2016	65,853,652	62,985,134
TOTAL	**697,043,157**	**701,283,987**

July 27, 2017

http://www.politico.com/magazine/story/2017/09/20/electoral-college-threat-national-security-215626

The Electoral College Is a National Security Threat

Politico Op-Ed
By Matthew Olsen and Benjamin Haas
September 20, 2017

In *Federalist* No. 68, his pseudonymous essay on "The Mode of Electing the President," Alexander Hamilton wrote that the Electoral College could shield the United States "from the desire in foreign powers to gain an improper ascendant in our councils." Because of the "transient existence" and dispersed makeup of the electors, he argued, hostile countries would find it too expensive and time-consuming to inject "sinister bias" into the process of choosing a president. At the time, the new American leaders feared meddling from Great Britain, their former colonial master, or perhaps from other powers such as France, and they designed a system to minimize the prospect that Europe's aging monarchies could seize control of their young democracy.

Hamilton and his colleagues never could have envisioned a year like 2016, when an enemy state—Russia—was able to manipulate America's election process with stunning effectiveness. But it's clear the national security rationale for the Electoral College is outdated and therefore it should be retired. Simply put, it enables foreign powers to more easily pierce the very shield Hamilton imagined it would be.

In Hamilton's day, as he argued, it would have been nearly impossible for a hostile power to co-opt dozens of briefly chosen electors flung across 13 states with primitive roads. But in the social media age, the Electoral College system provides ripe microtargeting grounds for foreign actors who intend to sabotage presidential elections via information and disinformation campaigns, as well as by hacking our voting infrastructure. One reason is that citizens in certain states simply have more voting power than citizens in other states, such as Texas and California. This makes it easier for malign outside forces to direct their efforts.

But what if the national popular vote determined the president instead of the Electoral College? No voter would be more electorally powerful than another. It would be more difficult for a foreign entity to sway many millions of voters scattered across the country than concentrated groups of tens of thousands of voters in just a few states. And it would be more difficult to tamper with voting systems on a nationwide basis than to hack into a handful of databases in crucial swing districts, which could alter an election's outcome. Yes, a foreign entity could disseminate messages to major cities across the entire country or try to carry out a broad-based cyberattack, but widespread actions of this sort would be not only more resource-intensive, but also more easily noticed, exposed and addressed.

Congressional investigators are currently examining Russia's 2016 disinformation campaign. Senator Mark Warner of Virginia, the ranking member of the Senate Intelligence Committee, has publicly called out Russian microtargeting in 2016 swing states. In March, Warner highlighted reports of "upwards of 1,000 paid internet trolls working out of a facility in Russia, in effect, taking over series of computers, which is then called a botnet," and he raised the question of whether these trolls targeted voters in Wisconsin, Michigan and Pennsylvania. Donald Trump, of course, won those three states by a combined total of fewer than 80,000 votes, securing him an Electoral College victory and a four-year trip to the Oval Office, despite losing the national popular vote by nearly 3 million votes.

Facebook has already acknowledged that fake users linked to Russia spent $100,000 running political ads on its platform, on polarizing topics such as gay rights, gun control, immigration and race. Some of these ads were aimed at specific geographic areas. But we don't yet know the full extent of Russia's microtargeting efforts or whether they involved any cooperation with Trump's campaign. And definitive answers to these questions may not emerge until Congress and special counsel Robert Mueller complete their investigations.

Apart from Russia's disinformation campaign during the election, there also is reason to be alarmed about Russian cyberattacks on voting systems, including voter databases and electronic poll books used to verify voters' identities and registration status. Recent reports indicate that Russian hackers targeted election systems in at least 21 states, and that the scope of these attacks exceeded what had been previously disclosed. These revelations are consistent with prior findings of intelligence agencies that Russian spies have been conducting reconnaissance on U.S. election processes and technology.

But setting aside for now worries about what happened in 2016, it is equally—if not more—important to consider the startling potential for interference in future presidential elections. As Clint Watts, a counterterrorism expert and former FBI agent, testified in a March hearing before the Senate Intelligence Committee, "Today, you can create content, gain the audience, build the bots, pick out the election and even the voters that are valued the most in swing states and actually insert the right content in a deliberate period." Furthermore, he explained that outside actors are capable of cleverly disguising bots as human beings with local flavor:

"If you do appropriate target audience analysis on social media, you can actually identify an audience in a foreign country or in the United States [and] parse out all of their preferences … If you inhale all of the accounts of people in Wisconsin, you identify the most common terms in it, you just recreate accounts that look exactly like people from Wisconsin."

And choosing the right voters to target is not a task that requires domestic assistance. As Issie Lapowsky of *Wired* recently explained, "there's nothing preventing a Russian actor or anyone else from reading the news and understanding the American electorate, and thanks to readily available digital tools, targeting that electorate is simple."

There are additional ways to help combat foreign interference in presidential elections. These include hardening our voting systems through better cybersecurity, making public the false narratives that adversaries push through fake news stories and encouraging social media companies to identify and block fake accounts and bogus ad campaigns designed to tilt our elections. These methods should be fully considered and, if appropriate, implemented. But ending the Electoral College should be central to the discussion.

Democrats may currently be more sympathetic to this cause given the outcome of the 2016 presidential election, but this should not be a partisan issue. Protecting U.S. elections from foreign interference is a legitimate national security concern that all Americans should be able to embrace. Both state and nonstate actors may have an interest in influencing our future elections, and there's no telling right now which presidential candidates they will prefer. In addition, although Russia clearly favored Trump in the 2016 election, it also demonstrated its willingness to gather ammunition on Republicans. According to the intelligence community's unclassified report on Russia's interference, "Russia collected on some Republican-affiliated targets but did not conduct a comparable disclosure campaign." If it were in Moscow's interest to promote a Democrat's bid for the White House or damage a Republican's, it would not hesitate to do so.

"Today it is the Democrats. Tomorrow it could be us," Florida Senator Marco Rubio stated in an October 2016 warning to his fellow Republicans against exploiting information hacked by Russia and disclosed by WikiLeaks.

There are, of course, other arguments against the Electoral College: that an individual's voting power should not be diluted or strengthened by virtue of geographic location, especially for an office that is supposed to represent every citizen equally; that it does not fulfill one of the original intentions of our framers—to exercise discretion and buffer the whims of the masses; that it has a dark history involving pro-slavery sentiments; that it often gives white, rural voters more voting power than minorities living in cities; that despite this, it still does not encourage candidates to campaign in rural areas but rather focuses their attention on cities in a smattering of swing states; and that swing states receive more federal funds than other states. But now, it's time to also examine the Electoral College through a national security lens.

Hamilton certainly deserves his towering reputation as "the most important Founding Father who never became president," but at least on the supposed national security benefits of the Electoral College, his argument no longer holds. To help protect our elections from foreign interference, we should change the way we choose our presidents.

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14 Videos Explaining the National Popular Vote Bill

April 24, 2017

- National Popular Vote: Introduction: https://www.youtube.com/watch?v=q0rOKo9BWEU
- Myths about Constitutionality: https://www.youtube.com/watch?v=ubIeQ-uO_b0
- Myths about Small States: https://www.youtube.com/watch?v=XWGWPTlLYnk
- Myths about Big Cities: https://www.youtube.com/watch?v=_gbwv5hf2Ps
- Myths about Big States and Big Counties: https://www.youtube.com/watch?v=Kfm6O1Fm14w
- Myths about Fraud: https://www.youtube.com/watch?v=4DdeFNCvVW0
- Myths about Post-Election Rule Changes: https://www.youtube.com/watch?v=G2Vdb5pNMLI
- Myths about Recounts: https://www.youtube.com/watch?v=z8FwrXRmGA4
- Myths about Compacts and Congressional Consent: https://www.youtube.com/watch?v=1fPQfe0dkP8
- Myths About Faithless Electors: https://www.youtube.com/watch?v=eUIb2lbaG0w
- Myths About Achilles' Heel: https://www.youtube.com/watch?v=HnjexgH9Ufw
- Myths About 15% Presidents: https://www.youtube.com/watch?v=X_IUIaf9egA
- Myths About Hurricanes: https://www.youtube.com/watch?v=4Afz7u9h56o
- Myths About Missing Vote Counts: https://www.youtube.com/watch?v=Zn2UpnsCOvc

Non-Citizens Affect Allocation of Electoral Votes under Current System

Under federal law, non-citizens cannot vote in presidential elections. Nonetheless, non-citizens significantly impact presidential elections because they affect the allocation of electoral votes among the states.

The U.S. Constitution states:

> "**Representatives ... shall be apportioned among the several States** which may be included within this Union, according to their respective Numbers, which shall be determined by ... **the whole Number of free Persons**."

Because of the winner-take-all rule, *legal* voters in a state that acquired additional electoral votes by virtue of the disproportionate presence of non-citizens deliver an enlarged bloc of electoral votes to the candidate receiving the most popular votes in their state. That is, the influence of the *legal* voters in such states is increased because of the presence of non-citizens.

Overall, the Democrats have a net 10 electoral-vote advantage in the 2012, 2016, and 2020 elections from the 15 states whose representation was affected by the counting of non-citizens in allocating electoral votes among the states.

Democratic non-battleground states gained 7 electoral votes:

- +5 for California
- +1 for New York
- +1 for Washington state.

Republican non-battleground states lost 3 electoral votes:

- +2 for Texas.
- –1 for Indiana
- –1 for Missouri
- –1 for Louisiana
- –1 for Montana
- –1 for Oklahoma.

Six battleground states were affected:

- +1 Florida
- –1 for Iowa
- –1 for Michigan
- –1 for North Carolina
- –1 for Ohio
- –1 for Pennsylvania.

Battleground states can, by definition, go either way, and therefore do not constitute a built-in advantage to either party.

Excluding non-citizens from the calculation used to apportion seats in the U.S. House of Representatives would require a federal constitutional amendment.

The National Popular Vote compact would eliminate the distortion in presidential elections caused by the disproportionate presence of non-citizens by guaranteeing the Presidency to the candidate who receives the most popular votes in all 50 states and the District of Columbia.

National Popular Election of the President

National Popular Vote!

www.NationalPopularVote.com

February 22, 2016

Answering Criticisms of the National Popular Vote bill (HB 929 and SB 376)

This memorandum provides answers to Hans von Spakovsky's incorrect claims that a nationwide popular vote for President would

(1) enable the 11 biggest states to control the outcome of presidential elections;
(2) diminish the influence of rural areas;
(3) elevate the importance of big urban centers;
(4) diminish the influence of smaller states;
(5) lead to contentious fights over provisional ballots;
(6) lead to more recounts;
(7) encourage voter fraud;
(8) lead to presidents being elected with small vote percentages;
(9) radicalize American politics;
(10) violate the Constitution;
(11) require congressional consent to take effect; and
(12) avoid the consent of a majority of Americans.

1. Eleven big states controlling the outcome of presidential elections

Hans von Spakovsky says that the National Popular Vote bill

> "would give the most populous states a controlling majority of the Electoral College, letting the voters of as few as 11 states control the outcome of presidential elections."[1]

The facts are that the 11 biggest states already contain a majority of the electoral votes (270 of 538). Von Spakovsky's claim that the biggest states would "control the outcome" is based on the politically preposterous scenario that a candidate would win 100% of the popular vote in the 11 biggest states and 0% in the 38 other states.

The fact is that that *no* big state delivered more than 63% of its popular vote to *any* presidential candidate in the 2000, 2004, 2008, or 2012 elections. Moreover, 5 of the biggest states (Ohio, Florida, Virginia, Pennsylvania, Michigan, and North Carolina) are closely divided "battleground" states or competitive states that are nearer 50%–50%.

Moreover, the 11 biggest states are a lock for either political party. When President George W. Bush won in 2000 and 2004, the biggest states divided 6–6, and he carried Texas, Florida, Ohio, North Carolina, Georgia, and Virginia.

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[1] All quotations of Hans Von Spakovsky are from "Protecting Electoral College from popular vote" in *Washington Times* on October 26, 2011, unless otherwise indicated.

In criticizing the idea of a nationwide vote for President, von Spakovsky ignores the fact that 50.01% (not 100%) of the voters of the same 11 biggest states could elect a President under the *current* state-by-state winner-take-all system.

More importantly, von Spakovsky ignores the fact that a small handful of states control the outcome of presidential elections *today* under the *current* state-by-state winner-take-all system. Under the *current* system, presidential candidates have no reason to pay attention to the issues of concern to voters in states where the statewide outcome is a foregone conclusion. Two-thirds of the 2012 general-election campaign events (176 of 253) were in just 4 states (Ohio, Florida, Virginia, and Iowa). Georgia (along with 37 other states) was totally ignored.

In a nationwide popular vote for President, every vote in every state would be equal throughout the United States. A vote cast in one of the 11 biggest states would be no more (or less) valuable or controlling than a vote cast anywhere else. The National Popular Vote bill would ensure that *every* vote, in *every* state, will be politically relevant in *every* presidential election.

See our video about big states at https://www.youtube.com/watch?v=Kfm6O1Fm14w.

2. Diminishing the influence of rural areas

Hans von Spakovsky says that the National Popular Vote bill would

"diminish the influence of rural areas."

Under the current state-by-state winner-take-all method of awarding electoral votes, a state's political influence is based on whether it is a closely divided "battleground" state. In 2012, the only states that received any campaign events and significant advertising expenditures were the 12 states where the outcome was between 45% and 51% Republican—that is, within 3 percentage points of Romney's nationwide percentage of 48%. The other 38 states were ignored.

Not surprisingly von Spakovsky offers no data to back up his assertion. The reason for this is that his assertion is totally false.

The facts are that the current system diminishes the influence of rural states because *none* of the 10 most rural states are "battleground" states. The 10 most rural states are Vermont (60.61% rural), Maine (57.86% rural), West Virginia (53.75% rural), Mississippi (50.20% rural), South Dakota (47.14% rural), Arkansas (46.10% rural), Montana (44.69% rural), North Dakota (44.68% rural), Alabama (43.74% rural), and Kentucky (43.13% rural).

3. Elevating the importance of big urban centers

Hans von Spakovsky says that the National Popular Vote bill would

"elevate the importance of big urban centers."

This concern arises from the misimpression that the big cities have more people than they actually do, and that they are more Democratic than they actually are, and from misinformation about how actual presidential campaigns are run.

The 10 biggest cities in the United States (San Jose is the 10th) together account for only 8% of the U.S. population.

The 100 biggest cities contain just *one-sixth* of the U.S. population. The 100 biggest cities voted ***63%* Democratic** in 2004.

By coincidence, a different *one-sixth* of the U.S. population live outside the nation's Metropolitan Statistical Areas (MSA's). This rural population voted ***60%* Republican**.

The remaining two thirds of the U.S. population lives *inside* a Metropolitan Statistical Area, but *outside* the central city. These *suburban* areas are evenly divided politically.

We don't have to speculate how presidential campaigns would be run in an election in which every vote is equal and the winner is the candidate who receives the most popular votes—because we already know.

Inside the handful of closely divided "battleground" states—such as Ohio, Florida, Virginia, and Iowa—every vote is *already* equal, and the winner is the candidate who receives the most popular votes *inside* those states.

Consider Ohio—the state that received over a quarter of the entire country's 253 general-election campaign events (and a similar percentage of the ad spending) in 2012.

Here is how real-world presidential candidates—advised by the nation's most astute strategists—campaigned in the nation's most critically important "battleground" state in 2012:

- The 4 biggest metro areas (with 54% of the state's population) received 52% of Ohio's 73 general-election campaign events—that is, almost exactly their share of the population.
- The 7 metro areas centered around medium-sized cities (with 23.6% of the state's population) received 23.3% of Ohio's 73 events—that is, almost exactly their share of the population.
- The 53 rural counties outside the state's Metropolitan Statistical Areas (with 22% of the state's population) received 25% of Ohio's 73 events—that is, almost exactly their share of the population (actually, a tad more).

In short, actual presidential candidates campaign everywhere—big metro areas, medium-sized metro areas, and rural areas—in elections in which every vote is equal, and the winner is the candidate who receives the most popular votes.

The same pattern exists inside the other major "battleground" states (Florida, Virginia, and Iowa) during the general-election campaign. These three states (along with Ohio) account for over two-thirds of the nation's campaign events (and a similar fraction of campaign expenditures).

No presidential campaign is going to ignore the rural one-sixth of the U.S. population any more than it is going to ignore the urban one-sixth. It is political preposterous to think that well-run campaigns would operate in any other way.

There is, of course, nothing in the National Popular Vote bill that mentions cities—much less anything that "elevates the importance of big urban centers." Under a nationwide vote for President, every vote is *equal*. The one-sixth of the people who live in the nation's 100 biggest cities are no more important—or less important—than the one-sixth of the people who live in rural areas.

See our video on big cities at https://www.youtube.com/watch?v=_gbwv5hf2Ps.

4. Diminishing the influence of smaller states

Hans von Spakovsky says that the National Popular Vote bill would

"diminish the influence of smaller states."

The small states (the 13 states with only three or four electoral votes) are the most disadvantaged and ignored group of states under the current state-by-state winner-take-all method of awarding electoral votes. The reason is that political power in presidential elections comes from being a closely divided battleground state, and 12 of the 13 smallest states are noncompetitive states in presidential elections.

These 12 small non-battleground states are not ignored because they are small, but because they are one-party states in presidential elections. In the last six presidential elections, six of the 13 small states have almost always gone Republican (Alaska, Idaho, Montana, North Dakota, South Dakota, and Wyoming), while 6 other small jurisdictions have regularly gone Democratic (Delaware, the District of Columbia, Hawaii, Maine, Rhode Island, and Vermont).

The political irrelevance of the 12 smallest states under the *current* system becomes especially clear if you notice that these states together have the same population—12 million—as the closely divided battleground state of Ohio. The 12 small states have 40 electoral votes—more than twice Ohio's 18 electoral votes. However, Ohio received 73 of the nation's 253 post-convention campaign events in 2012, while the 12 small non-battleground states received none.

Now let's look at the one state, among the smallest 13 states, that receives any general-election campaign attention. New Hampshire received 12 of the 253 general-election campaign events. New Hampshire received this much attention because political clout comes from being a closely divided battleground state (not from being a small state). In a national popular vote for President, *every vote would be equal*. Under National Popular Vote, a vote in Wyoming would suddenly become as important as a vote in New Hampshire. If every vote were equal, each of the 12 smallest states would be likely to receive about 1 general-election event, instead of just one state (New Hampshire) receiving 12 events.

The fact that the small states are disadvantaged by the current state-by-state winner-take-all system has long been recognized by prominent officials from those states. In 1966, Delaware led a group of 12 predominantly small states in suing New York (then a closely divided battleground state) in the U.S. Supreme Court in an (unsuccessful) effort to get state winner-take-all statutes declared unconstitutional.

See our video on small states at https://www.youtube.com/watch?v=XWGWPTlLYnk.

5. Contentious fights over provisional ballots

Hans von Spakovsky has stated that a nationwide election of the President would lead to

"contentious fights over provisional ballots"

and has also stated

"Every additional vote found anywhere in the country could make the difference to the losing candidate."

The fact is that provisional ballots are far more likely to lead to contentious fights under the *current* state-by-state winner-take-all system than under a nationwide vote.

One reason is that the closely divided "battleground" state of Ohio has historically had an unusually large number of provisional ballots. For example, there were more than 150,000 provisional ballots in 2004 in Ohio, where President George W. Bush's margin was only 118,601. The national outcome of the 2004 election in the Electoral College would have been

reversed with a switch of 59,393 votes out of a total of 5,627,903 votes in Ohio (despite President Bush's nationwide lead of over 3,000,000 votes). Provisional ballots are either accepted or rejected within about two weeks after an election (and about 71% are generally accepted). After all the valid provisional ballots were counted in Ohio in 2004, President Bush was declared the winner of Ohio (and hence nationally).

If provisional ballots had existed in Florida in 2000, provisional ballots would clearly have played a critical role in determining the winner (where the winner's final statewide margin was only 537 votes).

In 2008, the number of provisional ballots exceeded the leading candidate's margin in Missouri (McCain's 3,903-vote margin out of 2,925,205 votes), North Carolina (Obama's 14,177-vote margin out of 4,310,789 votes), and Indiana (Obama's 28,391-vote margin out of 2,751,054).

There were 12 closely divided battleground states in the 2012 election. Thus, there were 12 states where provisional ballots could potentially have played a decisive role in determining the winner under the current state-by-state winner-take-all system.

We agree with von Spakovsky that any vote "anywhere in the country could make the difference" in a nationwide vote for President. Indeed, the most important reason to adopt the National Popular Vote plan is to make *every* vote in *every* state politically relevant in *every* presidential election. However, we believe that all votes should be carefully scrutinized, vigorously contested (if appropriate), and ultimately counted if judged to be valid. We do not view the fact that every vote "could make the difference" as an evil.

6. Recounts

Hans von Spakovsky has stated that the current state-by-state winner-take-all method of awarding electoral votes

"reduces the possibility of a recount"

and

"has provided orderly elections for more than 200 years."

Nothing could be further from the facts.

The current state-by-state winner-take-all system of electing the President has repeatedly produced unnecessary artificial crises that would not have arisen if there had been a single large national pool of votes and if the winner had been the candidate who received the most popular votes nationwide.

There have been five litigated state counts in the nation's 57 presidential elections under the current system. This high frequency contrasts with relative rarity of recounts in elections in which the winner is simply the candidate receiving the most votes from those served by the office. There were only 22 recounts among the 4,072 statewide general elections in the 13-year period between 2000 and 2012—that is, a probability of 1-in-185.

In other words, the probability of a disputed presidential election conducted using the current state-by-state winner-take-all system is dramatically higher than the probability of a recount in an election in which there is a single pool of votes and in which the winner is the candidate who receives the most popular votes.

Recounts would be far less likely under the National Popular Vote bill than under the current system because there would be a single large national pool of votes instead of 51 separate pools. Given the 1-in-185 chance of a recount and given that there is a presidential election every four years, one would expect a recount about once in 740 years under a National Popular Vote system. In fact, the probability of a close national election would be even less than 1-in-185 because the 1-in-185 statistic is based on statewide recounts, and recounts become less likely with larger pools of votes. Thus, the probability of a national recount would be even less than 1-in-185 (and even less frequent than once in 740 years).

Many people do not realize how rare recounts are in actual practice, how few votes are changed by recounts, and how few recounts ever change the outcome of an election.

The average change in the margin of victory as a result of a statewide recount is a mere 294 votes.

Recounts are discussed in considerable additional detail in our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (available for reading or downloading for free at www.NationalPopularVote.com).

Also, see our short video on recounts at https://www.youtube.com/watch?v=z8FwrXRmGA4.

7. Voter Fraud

Hans von Spakovsky has stated that a nationwide election of the President would

> "encourage voter fraud since every bogus vote could make the difference in changing the outcome of a national race."

Executing electoral fraud without detection requires a situation in which altering a very small number of votes can have a very large impact.

Under the current state-by-state winner-take-all system, a small number of people in a closely divided battleground state can affect enough popular votes to flip all of that state's electoral votes and, hence, the national outcome.

A mere 537 popular votes in Florida in 2000 determined 25 electoral votes and thereby decided the national winner in an election in which 105,000,000 votes were cast.

A shift of 1,710 votes in California would have switched all of California's electoral votes and thereby defeated President Wilson in 1916, despite his nationwide lead of 579,000 votes. It is easier to flip 1,710 votes than 579,000 votes.

As former Colorado Congressman and presidential candidate Tom Tancredo (R) has said,

> "The issue of voter fraud … won't entirely go away with the National Popular Vote plan, but it is harder to mobilize massive voter fraud on the national level without getting caught, than it is to do so in a few key states. Voter fraud is already a problem. The National Popular Vote makes it a smaller one." [2]

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[2] Tancredo, Tom. Should every vote count? November 11, 2011. http://www.wnd.com/index.php?pageId=366929.

In summary, the outcome of a presidential election is less likely to be affected by fraud with a single large nationwide pool of votes than under the current state-by-state winner-take-all system.

See our video on voter fraud at https://www.youtube.com/watch?v=4DdeFNCvVW0.

8. Presidents elected with small vote percentages

Hans von Spakovsky has stated:

> "since the winner under the NPV is whatever candidate gets the most votes, ... this could lead to presidents elected with very small pluralities."

In fact, the current system of electing the President doesn't require that a candidate receive a majority of a state's popular vote in order to win all of the state's electoral votes. Even states with majority-vote requirements for other offices (such as Georgia and Louisiana) do not have such a requirement for President.

Moreover, the current system does not, of course, require that a candidate receive a majority of the nationwide popular vote.

In fact, 18 of our 57 presidential elections have been won by a candidate who did not receive a majority of the popular vote nationwide, including Presidents

- Lincoln (1860), who received 39% of the national popular vote,
- John Quincy Adams, who failed to receive the most popular votes nationwide,
- Hayes, who failed to receive the most popular votes nationwide,
- Benjamin Harrison, who failed to receive the most popular votes nationwide,
- George W. Bush (2000), who failed to receive the most popular votes nationwide,
- Polk,
- Taylor,
- Buchanan,
- Garfield,
- Cleveland,
- Wilson (1912 and 1916)m
- Truman,
- Kennedy,
- Nixon (1968), and
- Clinton (1992 and 1996).

As a practical matter, there is plenty of real-world evidence that candidates do not win elective office with small vote percentages in elections in which the winner is the candidate receiving the most popular votes. For example, of the 1,027 winning candidates for state chief executive (governor) since World War II and 2015,

- 88% got over 50% of the popular vote;
- 98% got over 45% of the popular vote;
- 99% got over 40% of the popular vote; and
- 100% got over 35% of the popular vote.

Similarly, there is no history of candidates winning U.S. Senate or congressional elections with very small vote percentages (even though most states do not have explicit majority-vote requirements and run-offs, as Georgia and Louisiana do).

Moreover, there is no reason to expect a breakdown of the two-party system. Four states elected their governors by popular vote when the Constitution took effect in 1789. Since then, all states have adopted popular election of their chief executive. After over 5,000 gubernatorial elections in which the winner was the candidate receiving the most popular votes, the two-party system has yet to break down in elections for chief executive. In fact, Duverger's law (which is based on a worldwide study of elections) asserts that the two-party system is, in fact, sustained when plurality voting is used to fill an office. Plurality voting is the method used throughout the United States today for virtually every election other than President, and the method used in the National Popular Vote bill.

See our video 'Myths about 15% Presidents, Regional and Extremist Candidates, and Break-Down of the Two-Party System" at https://www.youtube.com/watch?v=X_IUIaf9egA

9. Radicalize American politics

Hans von Spakovsky has stated that a nationwide election of the President

"could radicalize American politics."

If an Electoral College type of arrangement were essential for avoiding extremist candidates, we would see evidence of extremism in elections (such as gubernatorial elections) that do not employ this kind of arrangement. In fact, there is no history of extremist governors, senators, and congressmen chosen in elections in which the winner is the candidate receiving the most popular votes.

See our video 'Myths about 15% Presidents, Regional and Extremist Candidates, and Break-Down of the Two-Party System" at https://www.youtube.com/watch?v=X_IUIaf9egA

10. Constitutionality

Hans von Spakovsky has questioned the constitutionality of the National Popular Vote bill.

The Constitution leaves it to each state to choose the method of selecting its own presidential electors. Article II states:

> "Each State shall appoint, **in such Manner as the Legislature thereof may direct**, a Number of Electors…."

48 states currently have so-called "winner-take-all" laws that award *all* of the state's presidential electors to the candidate receiving the most popular votes inside each *separate* state.

These "winner-take-all" laws are state laws. They are ***not*** part of the U.S. Constitution. They were never debated by the Constitutional Convention. They were never mentioned in the *Federalist Papers*.

Only three states enacted winner-take-all laws for our nation's first presidential election in 1789, and all repealed them by 1800.

After 10 states had adopted winner-take-all laws, Missouri Senator Thomas Hart Benton warned in an 1824 Senate speech:

"The general ticket system [winner-take-all], now existing in 10 States was … not [the offspring] of any disposition to give fair play to the will of the people. **It was adopted by the leading men of those states, to enable them to consolidate the vote of the State.**"

The National Popular Vote bill is state legislation that would replace existing state winner-take-all laws with a new law guaranteeing the Presidency to the candidate receiving the most popular votes in all 50 states (and DC).

Some defenders of existing state winner-take-all laws have argued that the National Popular Vote might be unconstitutional because it is state legislation, as opposed to a federal constitutional amendment—overlooking the fact that existing winner-take-all laws were not enacted as a federal constitutional amendment, but, instead, as state legislation in exactly the way specified in the Constitution.

State winner-take-all laws can be changed or repealed in the same way that they were originally enacted—namely by passing a different state law.

The 10th Amendment independently addresses the question of whether the states are prohibited from exercising a particular power when the Constitution contains no specific prohibition against it. That is, the 10th Amendment addresses the question of whether there are *implicit* restrictions on the states as to allowable methods for appointing presidential electors.

"The powers not delegated to the United States by the Constitution, **nor prohibited by it to the States, are reserved to the States** respectively, or to the people."

Section 1 of Article II of the Constitution contains only one restriction on state choices on the manner of appointing their presidential electors, namely that no state may appoint a member of Congress or federal appointees as presidential elector.

The 10th Amendment was ratified in 1791 (that is, *after* ratification of the original 1787 Constitution) and thus takes precedence over the original Constitution. Even if there were enforceable implicit restrictions in the original Constitution on state choices on the manner of appointing their presidential electors (perhaps in the form of penumbral emanations from section 1 of Article II), such implicit restrictions were extinguished in 1791 by the 10th Amendment.

See our video "Myths about Constitutionality" at https://www.youtube.com/watch?v=ubleQ-uO_b0

11. Congressional Consent

Hans von Spakovsky has raised the issue of whether the National Popular Vote interstate compact can go into effect without congressional consent.

An interstate compact is a type of law authorized by the U.S. Constitution that enables sovereign states to enter into legally enforceable contractual obligations with one another. The Constitution authorizes states to enter into interstate compacts. The Constitution contains no subject matter limitation on compacts.

If congressional consent turns out to be required for a given interstate compact, the U.S. Supreme Court has ruled that such consent may be given *before or after* the requisite number or combination of states have approved the compact. The Court said in *Virginia v. Tennessee* (148 U.S. 503):

"The constitution does not state when the consent of congress shall be given, **whether it shall precede or may follow** the compact made, or whether it shall be express or may be implied."

Except for the relatively few interstate compacts initiated by Congress itself or the small number of compacts to which Congress has given advance consent, Congress has historically only voted on a compact after it has been enacted by the requisite number or combination of states specified in the compact (and often not even then).

Concerning the question as to whether Congressional consent is required for a particular compact, the U.S. Supreme Court ruled in 1893 (*Virginia v. Tennessee*, 148 U.S. 503) and 1976 (*New Hampshire v. Maine*, 426 U.S. 363) and 1978 (*U.S. Steel Corporation v. Multistate Tax Commission,* 434 *U.S.* 452) that congressional consent is only required for interstate compacts that

"encroach upon or interfere with the just supremacy of the United States."

In the case of the National Popular Vote compact, the Constitution empowers each state to choose the method of appointing its presidential electors. Article II states:

"Each State shall appoint, **in such Manner as the Legislature thereof may direc**t, a Number of Electors...."

In the 1893 case of *McPherson v. Blacker* (146 *U.S.* 1), the U.S. Supreme Court ruled that

"The appointment and mode of appointment of electors belong ***exclusively*** to the states."

That is, there simply is no federal power—much less federal supremacy—because the choice of method of appointing its own presidential electors is ***exclusively*** a state power.

The absence of federal power concerning the choice of method of awarding electoral votes becomes especially clear if one compares Article II giving the states ***exclusive*** power over presidential elections (quoted above) with the parallel constitutional provision in Article I giving states ***primary***—but not ***exclusive***—power over congressional elections. Article I states:

"The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; **but the Congress may at any time by Law make or alter such Regulations**."

Some defenders of the existing state-by-state winner-take-all method of awarding electoral votes have made the argument that the federal government has an "interest" in the National Popular Vote compact. However, even if there were some arguable "federal interest" in the states' exercise of one of their exclusive powers, the U.S. Supreme Court has specifically cautioned (*U.S. Steel Corporation v. Multistate Tax Commission,* 434 U.S. 452):

"The dissent appears to confuse potential impact on 'federal interests' with threats to 'federal supremacy.'"

The U.S. Supreme Court then said:

"Absent a threat of encroachment or interference through enhanced state power, **the existence of a federal interest is irrelevant**. Indeed, every state cooperative action touching interstate or foreign commerce implicates some federal interest. Were that the test under the Compact Clause, virtually all interstate agreements and reciprocal legislation would require congressional approval."

Some defenders of the current system have argued that the U.S. Supreme Court has been wrong on this issue since the 19th Century and have said that they intend to litigate the National Popular Vote compact after it is enacted by states possessing a majority of the electoral votes—presumably in a lawsuit among the states under the original jurisdiction of the U.S. Supreme Court.

If the U.S. Supreme Court applies its long-standing precedents, it will decide that the National Popular Vote compact may take effect without congressional consent.

Of course, if the Supreme Court decides that the National Popular Vote compact requires congressional consent, the compact would not take effect until subsequently approved by Congress.

In this event, consideration of the compact by Congress would then occur at a moment when states representing a majority of the Electoral College had already enacted the compact and in a political environment where about 75% of the public favors election of the President on the basis of which candidate receives the most popular votes in all 50 states and DC.

See our video "Myths about Interstate Compacts and Congressional Consent" at https://www.youtube.com/watch?v=1fPQfe0dkP8

12. Position of majority of Americans

A survey of 819 Georgia voters conducted on January 27-28, 2015, showed 74% overall support for the idea that the President of the United States should be the candidate who receives the most popular votes in all 50 states. Voters were asked

> "How do you think we should elect the President: Should it be the candidate who gets the most votes in all 50 states, or the current Electoral College system?"

By political affiliation, support for a national popular vote for President was 75% among Republicans, 78% among Democrats, and 67% among others. By gender, support was 80% among women and 68% among men. By age, support was 68% among 18-29 year olds, 77% among 30-45 year olds, 74% among 46-65 year olds, and 76% for those older than 65. By race, support was 77% among whites, 71% among African-Americans, and 67% among others (representing 7% of all respondents). The survey was conducted by Public Policy Polling, and has a margin of error of plus or minus 3½%. The poll may be found at http://www.nationalpopularvote.com/sites/default/files/georgia-results-jan-2015.pdf.

Similar polls in other states have produced similarly high percentages of public support for the idea that the President of the United States should be the candidate who receives the most popular votes in all 50 states.

Additional Information about National Popular Vote

Additional information is in our book *Every Vote Equal: A State-Based Plan for Electing the President by National Popular Vote* (available for reading or downloading for free at www.NationalPopularVote.com).